IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-56

IN THE MATTER OF EDNA SMITH, APPELLANT

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of South Carolina on the grounds that it is manifest that the decision below was clearly correct, that there are no conflicts in decisions, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

For the purpose of this Motion only, the Appellee assumes, without conceding, the Court's jurisdiction herein.

STATEMENT

This is an appeal from the Order of the South Carolina Supreme Court, dated March 17, 1977, finding that Appellant had violated the Code of Professional Responsibility [1] and administering a public reprimand for her unethical conduct.[2]

Appellant Edna Smith is an attorney licensed to practice law in the State of South Carolina and, at the time of these events, was engaged in private practice with the Carolina Community Law Firm (the firm's name was later changed to Buhl, Smith and Bagby).[3] In her capacity as a private attorney, she served as legal consultant to the South Carolina Council on Human Relations, a private organization, for which she received a fee of $10,000.00 per year.

She also acted as a cooperating attorney with the ACLU, serving as Vice-President and member of the Board of Directors of the South Carolina Chapter of that organization.

Pursuant to the request of her client, the Council on Human Rights, Appellant contacted one Gary Allen and requested that he set up a meeting between Appellant and certain women in Aiken County, South Carolina, who had been sterilized, or had been advised by their physician that they should undergo sterilization as a means of family planning. This meeting took place in the latter part of July, 1973. On the day of the meeting, a Mrs. Marietta Williams was approached by Mr. Allen as she left the Aiken County Hospital, where her newborn baby was critically ill. Mr. Allen requested that Mrs. Williams accompany him to his office, stating that there were some people at his office who

[1] The American Bar Association's Code of Professional Responsibility was adopted by the South Carolina Supreme Court on March 1, 1973.
[2] Jurisdiction Statement, App. 1a.
[3] Appellant's law partner, Herbert Buhl, is a staff attorney for the ACLU, receiving a salary for that position; Appellant's other law partner, Carlton Bagby, is a cooperating attorney with the ACLU.

would like to talk with her about her recent sterilization. Mrs. Williams, although she had no previous knowledge of the meeting, went to Mr. Allen's office, where she was introduced to Appellant Edna Smith. During the meeting which was attended by two other ladies and members of the press, Appellant advised Mrs. Williams of her legal rights and remedies in regard to her sterilization and informed her of her right to bring an action for money damages against her doctor. In talking with Mrs. Williams and the other ladies, Appellant represented herself to be an attorney and informed the group that the ACLU was an organization that could bring an action on their behalf for money damages against Dr. Pierce, a private physician in Aiken County. After discussing her sterilization with Appellant and being fully advised of her legal rights and remedies, Mrs. Williams informed Appellant that she would contact Appellant, if she decided to bring such an action.

Appellant gave instructions that the ladies should write the ACLU if they desired that organization to bring suit for them. In the early part of August, only one request had been received. Appellant was instructed by the ACLU to contact the other ladies again about filing suit. On August 30, 1973, without having been contacted by Mrs. Williams in any way during the interim, Appellant wrote to Mrs. Williams on the stationery of her private law firm, signing the letter as Attorney-at-Law. In this letter, which was the subject of the disciplinary action, Appellant stated:

> You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.
>
> • • •

> About the lawsuit, if you are interested, let me know, and I'll let you know when we will be coming down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf. Jurisdictional Statement, App. 25a.

By Appellant's own admission at the disciplinary hearing, the letter was an attempt by her to seek out Mrs. Williams as a member of the plaintiff class in a lawsuit for money damages against the doctor who had performed the sterilization operation. Shortly thereafter, Mrs. Williams called Appellant and informed her that she did not want to bring a legal action against Dr. Pierce.

Subsequently, two women did sue Dr. Pierce for money damages.[4] The ladies were presented by attorneys of the American Civil Liberties Union (including Appellant's law partner, Carlton Bagby) who requested on behalf of their clients that the court award attorneys fees.

A hearing was held before a Panel of Board of Commissioners on Grievances and Discipline on March 20, 1975, at which time Appellant was afforded opportunity to answer the charges. On October 7, 1975, the Panel filed its Report finding Appellant guilty of misconduct in that she violated certain rules of the Court's Code of Professional Responsibility. The Panel recommended that a private reprimand be administered. This Report was affirmed by the full Board on January 9, 1976.

On July 27, 1976, Appellant petitioned the South Carolina Supreme Court to review the disciplinary action pursuant to Section 34 of the Court's Rule on Disciplinary

[4] *Doe v. Pierce*, No. 74-475 (D.S.C. 1974). Plaintiffs requested $15,000,000.00 in damages. This case was tried before a jury and resulted in a verdict against Dr. Pierce for one of the plaintiffs in the amount of $5.00 nominal damages. On appeal, the Fourth Circuit Court of Appeals reversed this judgment finding that Dr. Pierce had not violated that plaintiff's civil rights under Section 1983.

Procedure.[5] On September 13, 1976, the South Carolina Supreme Court ordered that the record in Appellant's case be certified to it for review and oral arguments. On March 17, 1977, the South Carolina Supreme Court issued its opinion finding Appellant guilty of misconduct and administering a public reprimand.

ARGUMENT

I

The decision below is clearly correct

The South Carolina Supreme Court held that Appellant had violated Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of its Code of Professional Responsibility. DR 2-104(A)(5) provides, *inter alia*, that:

> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice except that:
>
> • • •
>
> (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, *but shall not seek*, employment from those contacted for the purpose of obtaining their joinder. (Emphasis added.) Jurisdictional Statement, App. 21a-22a.

The facts of this case readily establish a violation of this provision. It is uncontested that Appellant arranged a

[5] Section 34 of the Rule on Disciplinary Procedure provides:

> Nothing in these Rules shall be construed to deprive the Supreme Court of the authority to require the certification to it of the record in any case, for such action as it deem proper.

In *Burns v. Clayton*, 237 S. C. 316, 331, 117 S. E. (2d) 300, 301 (1960), the South Carolina Supreme Court stated:

> The Board's report is advisory only, this Court is nowise bound to accept its recommendations; and upon this Court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

meeting in Aiken, South Carolina, where she gave unsolicited legal advice to several women concerning their sterilization and further advised them of the availability of the American Civil Liberties Union to bring legal action in their behalf. Having given this advice, the attorney in a class action is prohibited by DR 2-104(A)(5) from seeking out members of the plaintiff class. By her own testimony, Appellant admitted that this was the very purpose of her August 30, 1973, letter, which was the subject of this disciplinary action.

Appellant's contention that DR 2-104(A)(5) merely prohibits acceptance of employment and not, as here, the seeking of employment [6] is a pregnable misreading of the disciplinary rule and would render meaningless the words "may accept, but shall not seek," if not subparagraph (5) in its entirety. Appellant has erroneously limited her argument to the provisions in DR 2-104 dealing with acceptance of employment, totally ignoring the language of subparagraph (5) which obviously deals with *seeking* employment in class actions. It was this latter subparagraph which the South Carolina Supreme Court found that Appellant had violated.

The Court also found that Appellant had violated Disciplinary Rule 2-103(D)(5)(a) and (c), which provides, *inter alia*, that:

> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> • • •
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services.
>
> • • •
>
> (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer. Jurisdictional Statement, App. 19a-20a.

In this regard, the Court found that Appellant had violated the above rule by promoting the use of ACLU attorneys, which included not only herself but her private law partners [7] and which would financially benefit the ACLU. Appellant maintains that she did not violate this provision, because she did not promote the use of any particular attorney.[8] However, the Court found that Appellant had pro-

[6] Jurisdictional Statement, pages 22-24. It would seem a matter of common sense that if an attorney was ethically prohibited from accepting employment that he would also be prohibited from seeking such clients for the purpose of accepting employment.

[7] Appellant's law partner, Carlton Bagby, was an attorney of record in *Doe v. Pierce, supra*. Furthermore, Appellant's other law partner, Herbert Buhl, is a salaried staff attorney of the ACLU. Testimony at the disciplinary hearing established that attorneys fees received by the ACLU went into the general fund from which its staff attorneys' salaries were paid.

[8] Mrs. Marietta Williams testified that Appellant stated to her at the July, 1973, meeting that Appellant would be her attorney if the ACLU brought an action for Mrs. Williams. It would be reasonable to conclude that the August 30, 1973, letter was a reiteration to Mrs. Williams that if the ACLU brought her action, Appellant would be the ACLU attorney representing her.

moted the use of particular attorneys—*i.e.*, her associate attorneys in the ACLU.[9]

This court has long recognized the legitimate interest that the states have in regulating professional misconduct in the bar.[10] In this regard, the South Carolina Supreme Court has adopted and enforced rules prohibiting the solicitation of legal business.[11] Indeed, this Court has recently recognized that restraints on personal solicitation of legal business may be justified. *Bates v. State Bar of Arizona,* 45 U. S. L. W. 4895 (U. S. No. 76-316, June 27, 1977). It should be noted at the outset that the present case does not involve the same practical considerations which concerned the Court in *NAACP v. Button,* 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963), its progeny of cases,[12] and in *Bates, supra.* In the present case, the aggrieved party had already received information regarding her legal rights and the appropriate means for effectuating them. She was also aware that the ACLU was an organization that she could go to if she wanted to bring a lawsuit. Therefore, she had meaningful access to the courts. Her response to Appellant as she

[9] Appellant's argument would be tantamount to permitting solicitation on behalf of law firms or other legal organizations, as long as the individual attorneys who would be ultimately responsible for the litigation were not mentioned. This would, of course, be to the distinct disadvantage of sole practitioners and small law firms. Certainly in this regard, Appellant is guilty of her own "Draconian" construction of the disciplinary rule and creates a distinction without a difference.

[10] *See,* Cohen v. Hurley, 366 U. S. 117, 81 S. Ct. 954, 6 L. Ed. (2d) 156 (1961); Theard v. United States, 354 U. S. 278, 77 S. Ct. 1274, 1 L. Ed. 1342 (1957); NAACP v. Button, 371 U. S. 415, 32 S. Ct. 328, 9 L. Ed. (2d) 405 (1963); Goldfarb v. Virginia State Bar, 421 U. S. 773, 95 S. Ct. 2004, 44 L. Ed. (2d) 572 (1975).

[11] *See, e.g., Ex parte* Finley, 93 S. C. 37, 81 S. E. 952 (1914); *In re* Crosby, 256 S. C. 325, 182 S. E. (2d) 289 (1971); *In re* Hartzog, 257 S. C. 84, 184 S. E. (2d) 116 (1971); *In re* Bloom, 265 S. C. 86, 217 S. E. (2d) 143 (1975); *In re* Craven, 267 S. C. 33, 225 S. E. (2d) 861 (1976); Appellant's assertion that ethical strictures on solicitation have received little enforcement in South Carolina prior to July, 1975 (Jurisdictional Statement, page 16) is completely unfounded.

[12] Brotherhood of R. R. Trainsmen v. Virginia, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. (2d) 89 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. (2d) 426 (1967); United Transportation Union v. Michigan, 401 U. S. 567, 91 S. Ct. 1076, 28 L. Ed. (2d) 339 (1971).

left the July, 1973, meeting was "if I need your help I will call you." The inquiry thus becomes: May an attorney after having informed a layman of his legal rights and a means of effectuating those rights, attempt to induce or pressure that person to allow the attorney, his firm or organization, to bring suit in his behalf? The dangers in allowing such conduct have been thoroughly discussed by members of the profession,[13] and include overreaching,[14] misrepresentation, stirring-up litigation,[15] preserving the dignity of the profession,[16] and adversely effecting disciplinary enforce-

[13] *See, e. g.,* Comment, *Sherman Act Scrutinty of Bar Restraints On Advertising and Solicitation,* 62 VA. L. REV. 1135, 1152-1164 (1976).

[14] "Overreaching" refers to the aggressive competition among lawyers for clients which leads to lawyers approaching clients at times when the clients are in no condition to properly consider retention of a lawyer. *See,* Comment, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available,* 81 YALE L. J. 1181, 1184 n. 23 (1972). Mrs. Williams testified that at the time of the July, 1973, meeting and the subsequent August 30, 1973, letter, her child was in the hospital suffering from dehydration and was not expected to live. She informed Appellant that she did not have time to think of suing anyone because of her baby's illness. However, the pressure upon her to bring a lawsuit was considerable as her own testimony reveals:

> . . . I got tired of everybody aggravating me. Everybody was coming to ask me wasn't I going to sign to file a lawsuit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue maybe then they will leave me alone, I'm tired of being bothered.

[15] Appellant attempted to persuade Mrs. Williams to file a lawsuit for money damages against her obstetrician. Such private litigation would invariably induce a breach in that doctor-patient relationship. This court recognized in *Button, supra,* the continued hostility to stirring-up private litigation which interferes with established relationships. Could a doctor be expected always to give his patient the best medical advice, if he knows an attorney could solicit his patient subsequently to bring a lawsuit against him? Is not the doctor-patient association due some protection under the First Amendment from competitive solicitation of lawsuits by attorneys?

[16] One of the most important consumer interests which the disciplinary rules have sought to protect is the professional competence of attorneys. By forcing an attorney to depend upon his reputation in order to retain old clients and attract new clients, the rules have indirectly encouraged him to do a better job for his client. If an attorney could attract clients by solicitation rather than reputation, he would be more inclined to shirk his duties. This would necessarily result in irreparable harm to the dignity of the profession. One commentator has observed that solicitation is likely to do more to weaken the force of the legal profession and hinder the administration of justice than any other form of unethical conduct. Comment, *Ambulance Chasing,* 30 N.Y.U.L. REV. 182, 186 (1955). A

ment.[17] It is submitted that on the facts of this case, Appellant clearly violated the disciplinary rules in question. Moreover, it is equally clear that the State of South Carolina had a compelling interest in protecting Mrs. Williams from the pressures asserted upon her to file a lawsuit against her physician.

A. **Vagueness**

Appellant argues that DR 2-103(D)(5)(a) and (c) and DR 2-104(A)(5) are vague in that they do not give fair notice of the conduct proscribed. It is obvious that counsel for Appellant have encountered some difficulty in making this argument, since they continuously refer generally to DR 2-103(D) and DR 2-104(A) rather than the specific sections which the Court below found that Appellant had violated. Appellant maintains, for example, that DR 2-103 (D)(5)(a) and (c) only prohibit an attorney from allowing an organization to promote his own services. This construction ignores the plain language of that statute which provides:

> A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services *or those of his partners or associates.* (Emphasis added.)

In discussing DR 2-104(A)(5) Appellant maintains that this disciplinary rule only prohibits the acceptance of employment and does not prohibit seeking out a client to be a party to the litigation. Again, Appellant has ignored the

client who has been overreached, denied a just recovery, or charged an exhorbitant fee is likely to circulate uncomplimentary publicity about the profession. When the public loses confidence in the bar, a doubt is created in the integrity of the court.

[17] Justice Powell's observations of the effects of permitting limited advertising on the policing of attorney ethics in *Bates v. State Bar of Arizona*, 45 U. S. L. W. 4895, 4907-8 (U. S. Opinion No. 76-316, June 27, 1977) apply tenfold to the issue of permitting solicitation.

plain language of that DR which provides: ". . . a lawyer may accept, but shall not seek. . ." [18]

Appellant attempts to avoid the plain language of these disciplinary rules by discussing them in the abstract. By avoiding the plain language of the rules and instead placing an obtuse interpretation on their terms, Appellant has attempted to show that the rules are vague and indefinite.

It is evident that the disciplinary rules in question are not so vague that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). It is all but frivolous to suggest that the disciplinary rules fail to give adequate warning of the activities they proscribe or to set out explicit standards for those that must apply it. *Broadrick v. Oklahoma*, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. (2d) 830 (1973). In the instant case, Appellant's conduct falls within the "hard core" of the disciplinary rules' prohibitions. By her own testimony Appellant was attempting to solicit Mrs. Williams as a member of the plaintiff class for a class action suit which the ACLU desired to bring. Moreover, this solicitation was performed on behalf of an organization which stood to gain financially from rendering this service.[19] Appellant's contention that the disciplinary rules are void for vagueness is clearly erroneous and unsubstantial.

[18] *See*, ABA Informal Opinion No. 1234 which held that a "legal aid lawyer who desires to raise certain issues in litigation but who is handling no litigation involving such issues may not seek out indigents and request the indigents to, or advise the indigents to, become, as clients, parties to the litigation." The opinion found that such conduct violated provisions of DR 2-104(A) and DR 2-103(D).

[19] Appellant testified that her private law firm, Carolina Community Law Firm, was originally formed as a public-interest law firm to represent people in various consumer-type cases. The members of the firm hoped to support their work through grants from various foundations. In fact, at the time of her solicitation, Appellant's law firm had submitted proposals to several foundations in order to operate their firm (indeed, two of their firms members including Appellant, were already receiving grants). Appellant admitted that in order for the firm to continue to request and to receive funds, it was necessary for them to have clients and to participate in cases involving welfare issues, prison, consumer issues, etc.

B. **Overbreadth.**

Appellant asserts that the correct standard for determining whether a "communication" is protected by the First Amendment is that such conduct is protected if it has *any* discernable purpose in addition to attracting business for the attorney's private law practice, citing *Jacoby v. California State Bar,* 45 U. S. L. W. 2529 (California, 1977) and *Belli v. State Bar,* 10 Cal. (3d) 824 (1974). The above cases dealt with publication of news articles authorized by attorneys and not with either advertising or personal solicitation by an attorney. This Court recognized in *Bates v. State Bar of Arizona,* 45 U. S. L. W. 4895 (U. S. No. 76-316, June 27, 1977), that personal solicitation posed dangers and objections not encountered in newspaper announcement advertising. Therefore, a standard imposed for publishing news articles as in *Jacoby* and *Belli, supra,* cannot be applied in this case. The Court further recognized in *Bates* that the First Amendment overbreadth doctrine applies weakly, if at all, in the ordinary commercial context, noting that speech in the form of advertising which is linked to commercial well being, is unlikely to be crushed by overbroad regulation.[20] The Court in *Bates* refused to apply the overbreadth doctrine to professional advertising. It is submitted that a similar holding would follow in this case, and the Court must consider the South Carolina Supreme Court's rules under the traditional rule that a statute cannot be challenged on the ground that such statute might be applied unconstitutionally in circumstances other than those before the Court. Therefore, the question in this case is not whether the disciplinary rules are overbroad, but rather whether Appellant's specific conduct is within the scope of the First Amendment.

[20] *Id.* at 4903.

II

There are no conflicts in decisions

Appellant asserts that the decision in the instant case is contrary to this Court's decisions in *NAACP v. Button,* 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963); *Brotherhood of R. R. Trainsmen v. Virginia,* 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. (2d) 89 (1964); *United Mine Workers v. Illinois State Bar,* 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. (2d) 426 (1967); *United Transportation Union v. Michigan,* 401 U. S. 567, 91 S. Ct. 1076, 28 L. Ed. (2d) 339 (1971). However, the facts of this case are readily distinguishable from the facts and holdings of the above decisions.

In the first instance, the aggrieved party was not a member of the ACLU or any other organization. Therefore, the holding of the "union cases" which recognized the right of union members to undertake collective activity in order to obtain meaningful access to the courts, is not applicable to this case.[21] The decision below turns upon its own facts. The aggrieved party was aware of her legal rights and of means of access to the courts prior to Appellant's letter of August 30, 1973; therefore, the Court's traditional concern of informing the public so as to afford the aggrieved party meaningful access to the court—*i.e.* due process of law—is not present in the instant case.[22]

Moreover, *NAACP v. Button* is also not apposite of this case. In *Button,* the State of Virginia had passed a statute[23] which prohibited solicitation of legal business by defining a "runner" or "capper", by defining those terms to

[21] In the union cases the Court recognized that the unions (unlike the ACLU here) had no financial interest in the litigation. *See,* United Transportation Union v. Michigan, *supra,* at 583, 91 S. Ct. at ...., 28 L. Ed. (2d) at 345-6.

[22] *See,* Bates v. State Bar of Arizona, 45 U. S. L. W. 4895 (U. S. No. 76-316, June 27, 1977).

[23] § 54-78, Code of Virginia (1950), as amended by Acts of 1956, Ex. Sess., c. 33.

include the use of an agent for an organization which retains an attorney in connection with an action to which it is not a party and in which it has no pecuniary right or liability. It was obvious that the State of Virginia had broadened the previous law to threaten civil rights group activities, particularly those of the NAACP. No attempt had been made prior to 1956 to proscribe the activities of the NAACP which had been carried on openly for years. The only question before the Court was the constitutionality of that statute as applied to the NAACP.

The Court found the statute to be unconstitutional, not because it prohibited particular acts as solicitation, but because it proscribed any arrangement by which prospective litigants are advised to seek the assistance of counsel. *NAACP v. Button, supra,* at 434, 83 S. Ct. at ...., 9 L. Ed. (2d) at 418. Contrary to the assertion of Appellant, the rules involved herein do not prohibit attorneys from accepting referrals of *pro bono* cases[24] nor do they prevent an attorney from advising citizens of their rights and of the availability of counsel.[25]

The Court in *Button* placed importance on the fact that the legal actions undertaken by the NAACP were against government, whether federal, state or local, for the achievement of lawful objections of equality of treatment. Thus, litigation became a form of political expression, and the Court held that the First and Fourteenth Amendments protect orderly group activities whereby minorities seek through lawful means to achieve legitimate political ends. In this respect this Court observed:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. *Id.* at 430, 83 S. Ct. at ...., 9 L. Ed. (2d) at 416.

[24] Appellant's Jurisdictional Statement, page 20.
[25] Appellant's Jurisdictional Statement, page 11.

The instant case differs from *Button* in two important respects: first, the lawsuit was not against government but against a private physician, *ergo,* private litigation[26] and not political expression; secondly, monetary stakes were involved. On the latter point, the Court in *Button* noted that because no monetary stakes were involved, there was no likelihood of a conflict between the aims and interests of the NAACP, and its member and nonmember Negro litigants.[27] While it is true that in subsequent cases, this Court has extended First Amendment protection to the collective activity of unions even in personal injury cases, those cases are not controlling of the case at hand. In the union cases, the court sought to protect the rights of union members to associate for the purpose of facilitating the securing of legal benefits for each other. In the instant case, Mrs. Williams did not belong to any union or organization; therefore, the First Amendment's right of association is not at issue.[28]

It is apparent that the facts in this case are quite different from the cases cited by Appellant. The disciplinary rules in question were not adopted as a means of suppressing civil rights group activities, but rather were formulated by the American Bar Association and have been

[26] The Court in *Button* recognized the traditional condemnation of conduct of attorneys in urging another to engage in private litigation. *Id.* at 441, 83 S. Ct. at ...., 9 L. Ed. (2d) at 423.
[27] In a subsequent lawsuit, *Doe v. Pierce,* No. 74-475 (D.S.C. 1974), the ACLU brought action on behalf of two women asking for monetary damages of $7,500,000.00 for each plaintiff. It is obvious with such a large amount of money at stake that the aim and interest of the ACLU, *i. e.,* to protect civil liberties (Jurisdictional Statement, page 21), may diverge from the aim and interest of the client, *i. e.* to recover monetary damages. It is interesting to note the emphasis placed by Appellant in her letter of August 30, 1977, on monetary recovery rather than rectification of civil liberties.
[28] There was no evidence presented at the disciplinary hearing that any member of the ACLU had been sterilized by Dr. Pierce or threatened with sterilization.

adopted by most states. These rules are not overbroad, as the Virginia statute in *Button,* in that they do not prohibit any arrangement by which an individual refers or recommends a particular lawyer. On the contrary, the rules as applied to Appellant only restrict an attorney, who has previously given unsolicited advice to a layman of his legal rights and further has advised him of his means to effectuate his rights, from seeking that person (either for himself or for an organization to which he belongs and whose primary purpose includes the rendition of legal services) as a plaintiff in a class action against a private defendant for money damages.

The decision below likewise does not conflict with this Court's decision in *In re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. (2d) 117, *reh. den.* 391 U. S. 961, 88 S. Ct. 1883, 20 L. Ed. (2d) 874 (1968). In *Ruffalo,* an Ohio attorney, who had been charged with solicitation through an agent, defended against this charge by personally testifying that he had merely hired the individual to investigate cases, including cases against the agent's other employer. At the conclusion of his testimony, Bar counsel amended his complaint to further allege that attorney Ruffalo was guilty of unethical conduct by hiring an individual to investigate that individual's employer. No additional evidence was taken on the matter. The Supreme Court of Ohio subsequently found that Ruffalo had engaged in unethical conduct, including the latter charge. The Court found that Ruffalo had no notice that his hiring the agent would be a disbarment offense until after he and the agent had testified. The Court went on to hold that a disciplinary proceeding was quasi-criminal in nature; therefore, the attorney must have fair notice of the charges made and be afforded opportunity for explanation and defense.

Even though this Court opined that a disciplinary proceeding was quasi-criminal in nature, it did not hold that a disciplinary proceeding must comply with all of the formalities and technical requirements of a purely criminal proceeding. In *Burns v. Clayton,* 237 S. C. 316, 117 S. E. (2d) 300 (1960), the South Carolina Supreme Court held that:

> Technical formality of allegation, as in an indictment, is not required in proceedings such as the present. All that is requisite to their validity is that the respondent be clearly apprised of the charges, *i. e.,* the facts upon which the claim of misconduct is founded, and that he be afforded reasonable opportunity for explanation and defense. *Id.* at 333, 117 S. E. (2d) at 308.[29]

In the instant case the complaint charged Appellant with solicitation and attached a copy of Appellant's letter of August 30, 1973, which was a basis for this charge. The South Carolina Supreme Court found Appellant guilty of solicitation. The complaint was never amended to allege any new offense as occurred in *Ruffalo,* and Appellant was given full opportunity to be heard on the charge. The Court below was clearly correct in concluding that Appellant was apprised of the charges against her. *See,* Jurisdictional Statement, App. 8a.[30]

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[29] *See also,* Seventh District Committee of the Virginia State Bar v. Gunter, 212 Va. 278, 183 S. E. (2d) 713 (1971); *In re* Kemp, 40 N. J. 588, 194 A. (2d) 263 (1963) (The New Jersey Court rejected the contention that a complaint must specify the Canon or disciplinary rule violated).

[30] The court noted that even if she had not been fully apprised of the charges, the proper procedure would have been to move the court to have the complaint made more definite and certain. Jurisdictional Statement, App. 8a. However, it is clear from the record that Appellant was aware of the charges and the applicability of DRs 2-103(D)(5)(a) and (c) and 2-104(A)(5). Both rules were discussed by counsel on Appellant's motion to dismiss made at the disciplinary hearing at the close of the Complainant's case. In addition, Appellant presented two out-of-state witnesses who testified to the nature of services offered by the ACLU as these services apply to DR 2-103(D)(S)(a) and (c). In fact, Appellant attempted to qualify one witness as an expert in constitutional law in order to have him answer a hypothetical question as to whether Appellant was guilty of a violation of the disciplinary rules.

Therefore, the decision of the court below does not conflict with *Button, Ruffalo* or any other decision of this court.[31]

III

There is no substantial federal question

In *Button, Brotherhood of R.R. Trainsmen, United Mine Workers, and United Transportation Union,*[32] cases cited by Appellant in support of her argument that the questions are substantial, the Court has focused on the *right of association of potential litigants.* Thus, this Court has held that union members can engage in collective activity for the purpose of facilitating their access to the courts. Furthermore, members of a minority can associate to litigate against government as a means of political expression.

Even though no member of the ACLU was an aggrieved party and the litigation was not a form of political expression against government, Appellant asserts that the above cases extend First Amendment protection to an attorney seeking-out non-member clients for the purpose of bringing a lawsuit for money damages against a private defendant. In other words, Appellant maintains that the First Amendment protects the right of an attorney to litigate. This Court, however, has never held that the First Amendment protects against reasonable state regulation either the right of an *attorney* to litigate or the right of an *attorney* to associate with a prospective client. If these cases were given such an effect, it would destroy the long-

[31] *See,* discussion under Argument I as to the sufficiency of evidence to establish Appellant's guilt. Since there was evidence of guilt, this case does not conflict with *Thompson v. City of Louisville,* 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. (2d) 654 (1960).

[32] NAACP v. Button, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963); Brotherhood of R. R. Trainsmen v. Virginia, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. (2d) 89 (1964); United Mine Workers v. Illinois State Bar, 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. (2d) 426 (1967); United Transportation Union v. Michigan, 401 U. S. 576, 91 S. Ct. 1076, 28 L. Ed. (2d) 339 (1971).

standing rules and concepts forbidding the solicitation of legal business, the intervention of lay intermediaries between the attorney and his client, and the aiding of the unauthorized practice of law, thus resulting in the complete erosion of the traditional attorney-client relationship. Moreover, if Appellant as an attorney has the right to litigate or to associate with a client for the purpose of bringing litigation, can any rational distinction be made between Appellant and any private practitioner? The obvious result would be the total elimination of restrictions on solicitation.

The Appellant's arguments that her acts were protected by the First Amendment are unsubstantial. The legitimate need for protecting the public and the profession against personal solicitation was recently recognized by this Court:

> [W]e also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or "runner". Activity of that kind might pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising.[33]

[33] Bates v. State Bar of Arizona, 45 U. S. L. W. 4895, 4899 (U. S. No. 76-316, June 27, 1977).

CONCLUSION

Wherefore Appellee respectfully submits that the decision below was clearly correct, that there are no conflicts of decisions, and that the questions upon which the cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of South Carolina.

Respectfully submitted,

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